83-459

NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal regulation of the non-Indian ocean salmon fishery off the coast of Washington which necessarily provides the Washington coastal treaty tribes a harvest of much more than 50% of the harvestable fish which would otherwise return to the tribes' usual and accustomed fishing grounds is in violation of the non-Indians' treaty right, as established by this court, to at least 50% of the harvest and/or federal statutory requirements requiring fair and equitable allocation of harvest.

2. Whether federal regulation of the non-Indian ocean salmon fishery off the coast of Washington which admittedly causes tremendous loss of ocean harvest and concomitant large transfers of salmon harvest to foreign fisheries violates the preeminent, "optimum yield" requirements of the federal Fisheries Conservation and Management Act of

1976 ("FCMA"), 16 U.S.C. § 1801, et seq.

3. To the extent, if any, that Indian treaty fishing rights are found to be inconsistent with the requirements of the FCMA, whether the treaties must be deemed modified as necessary to eliminate such inconsistency while preserving the Indian treaty fishermen's right to up to 50% of the harvest.

PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed, are the following:

Petitioner:	Washington State Charterboat Association (Plaintiff-Appellant)
Respondent:	Malcolm Baldrige, Secretary of Commerce (Defendant-Appellee)

In addition, the following appeared as Amici Curiae:

Quinault Indian Nation
Hoh Indian Tribe
Quileute Indian Tribe

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JURISDICTION

The jurisdiction of the Court to review the judgment entered by the Ninth Circuit Court of Appeals on March 29, 1983, rehearing denied on June 9, 1983, is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

Treaty of Olympia, July 1, 1855, Jan. 25, 1856, United States-Quinault and Quileute Indian Tribes, 12 Stat. 971:

> Article III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the

purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. . . . .

Fisheries Conservation and Management Act (in pertinent parts):

16 U.S.C. § 1801(b)(3), (4):

(3) To promote domestic, commercial and recreational fishing under sound conservation and management principles;

(4) To provide for the preparation and implementation, in accordance with national standards, of a fishery management plan which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.

16 U.S.C. § 1851(a)(1), (4):

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

. . .

(4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign privileges among various United States fishermen, such allocation shall be: (a) fair

and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner than no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1802(18):

> The term "optimum," with respect to the yield from a fishery, means the amount of fish--
>
> (A) Which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities; and
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> (B) Which is prescribed as such on the basis of the maximum sustainable yield from such fishery as modified by any relevant economic, social, or ecological factor.

STATEMENT OF THE CASE

This case was originally heard in United States District Court for the Western District of Washington. Proper jurisdiction for the District Court as the court of first instance in this case is provided by 28 U.S.C. § 2201 and 16 U.S.C. § 1855(d).

The petitioner, Washington State

Charterboat Association (hereinafter "Association") consists of approximately 350 individuals representing most Washington citizens who operate ocean charter offices and vessels engaged in the ocean recreational fishing industry. Association members are primarily located in the Washington fishing ports of Westport, Ilwaco, LaPush, Neah Bay, and Port Angeles. The vast majority of the ocean sports fishery in Washington and the economic vitality of many coastal communities is dependent upon the charterboat industry.

In modern times the majority of the recreational salmon harvest in Washington State has occurred off the coast of Washington. The harvest in this sports fishery consists of stocks emanating from rivers throughout the Northwest states and British Columbia. A relatively small portion of this harvest has been from salmon stocks emanating from the streams of the north

Washington coastal area. These north coastal streams are usual and accustomed fishing grounds for three tribes, the Hoh, the Quileute, and the Quinault, with each of these tribes having coterminous treaty rights generally throughout the many river systems of the north Washington coastal region.

Fishing from 3 to 200 miles off the coast of Washington is regulated by the Secretary of Commerce ("Secretary") pursuant to the federal Fisheries Conservation and Management Act of 1976 ("FCMA"), 16 U.S.C. § 1801, et seq. The primary issue in this case is what allocation format must be used by the Secretary to divide harvest of coastal stocks between the Indian and non-Indian fisheries in order to comply with the requirements of the FCMA and the Indian treaty fishing rights. The issue is not whether the tribes should be allowed to harvest 50% of the available fish, but rather

how this allocation should be accomplished.

The Association believes that the unique characteristics of the ocean salmon fishery, which make it completely distinct from terminal area fisheries such as those dealt with by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (hereinafter "Fishing Vessel"), impose important limitations on management measures which can be utilized to comply with both the FCMA standards and treaty fishing rights. Allocation formats which often work to provide both Indian and non-Indian fishermen a "fair share" of the resource in terminal area fisheries simply cannot provide this result when applied in the unique circumstances of the mixed-stock ocean fishery off the Washington coast.

The primary distinction between the ocean fishery and terminal area fisheries

dealt with in Fishing Vessel is that the ocean fishery is a mixed stock fishery comprised of many different species of salmon and many different runs[1] of each species. While some limited "targeting" among species is possible, generally ocean fishermen cannot predetermine which specie or run of fish they will catch and, even when caught, can still not determine the river of origin. In contrast, the terminal fisheries dealt with in Fishing Vessel occurred largely near or in river mouths where the various runs are substantially separated as they prepare to return to spawn. Targeting harvest is far more effective in this terminal area situation.

Since non-Indian net fisheries along the Washington coast are, for sound biological reasons, prohibited by state law imple-

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[1]A "run" of fish is a group of anadromous fish on their return migration for spawning which is identified by species, race and water of origin (and return).

menting international and interstate agreements (RCW 75.12.200-.260), and are also largely impractical given weather conditions and lack of safe harbors, the ocean fishery is limited to a hook-and-line fishery which only produces harvests of chinook, coho, and pink salmon. Coastal species such as sockeye salmon, chum salmon, and steelhead trout, which are not caught on a hook-and-line fishery, are, therefore, harvested almost exclusively by treaty Indian, in-river net fisheries. Again, this presents a sharp contrast to the terminal area situation reviewed in Fishing Vessel, since most terminal area harvest in that case occurred in Washington's internal waters where both Indian and non-Indian net fishing is legal, thus allowing a sharing of harvest on all species returning to the streams in the Puget Sound area and Strait of Juan de Fuca area.

The coastal, in-river fishery is

nearly exclusively an Indian net fishery since, with the exception of very inefficient, non-Indian river sports fisheries which harvest only a small percentage of some of the coastal runs, harvestable returns to coastal streams are only available to Indian net fishermen. Again, the "nonbiting" species are not available for a hook-and-line, non-Indian, in-river fishery. Furthermore, many of the largest coastal runs are essentially contained within the boundaries of the tribal reservations and thus are not available for non-Indian fishing. The remoteness and inaccessibility of many of the Washington coastal streams is also a severe limitation to non-Indian, in-river harvest.

Thus, once various coastal stocks have escaped from the mixed stock ocean fishery, they are essentially only available to Indian treaty harvest which harvest occurs mostly by way of an in-river net fishery.

Completely unlike the situation in Fishing Vessel, the non-Indian fishery simply has no opportunity to harvest several of the coastal stocks due to biological and legal limitations. Thus "equal" or "fair" sharing of each run of coastal stocks subject to the treaty right is impossible.

Given the nature of the mixed stock ocean fishery, and the distinction between ocean versus terminal area fisheries for non-Indian and Indian fishermen, respectively, various treaty allocation schemes to achieve 50% treaty/nontreaty sharing produce widely varying levels of actual harvest sharing, ocean harvest, and transfer of harvests to other fisheries, including foreign fisheries. The allocation format required by the courts below is a run-by-run allocation with ocean harvest levels managed as necessary to provide a return to each coastal tribe's fishery of 50% of the harvestable

numbers (numbers above those needed for proper spawning escapement) of <u>each run</u> returning to any of the treaty area streams.

While this 50% sharing of each run would be ideal, because of the mixed-stock nature of ocean fishery as described above, there is, unfortunately, no way to manage the non-Indian ocean fishery so that 50% of harvestable numbers of each run subject to the treaty right returns to each tribe's in-river net fishery. Instead, the courts below have required that 50% of the weakest run be allowed to return to the tribal fishery. This results in more than 50% of the harvestable numbers of all other, stronger "biting" coastal runs returning to the coastal streams for tribal harvest, and, of course, a return of all of the non-biting species.

Since the ocean, mixed stock fishery involves a large number of different runs

from different regions of origin, some of which are strong and some of which are weak, and since coastal stocks cannot be segregated during ocean harvest, all ocean fishing must stop when non-Indian harvest of the weakest coastal stock has reached 50% of the harvestable numbers of that stock. Because of this, all other coastal stocks, which could otherwise support additional non-Indian harvest, are allowed to escape to the tribe's in-river net fisheries at levels greater than 50% of their harvestable numbers.[2] Successful application of this run-by-run management scheme guarantees, therefore, that the treaty tribes will have an opportunity to harvest more than 50% of all coastal treaty runs but the weakest.

Not only does run-by-run management of this type totally eliminate the oppor-

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[2]As set forth above, nearly all of the nonbiting coastal stocks will escape to the coastal streams for harvest by treaty Indian fishermen.

tunity of non-Indians to harvest 50% of the coastal stocks subject to the treaty rights, but it severely reduces the harvest on other, much stronger stocks which are not subject to the treaty obligations. Since the vast majority of the ocean harvest is not from coastal stocks, an early closure to provide a harvestable return of 50% of the weakest stock to the in-river Indian treaty fishery prevents much larger harvests on stronger stocks with other regions of origin. Due to the highly migratory nature of salmon, a very substantial number of these salmon lost to the ocean fishery migrate into Puget Sound and Canadian fisheries for harvest.

The impact of run-by-run management on overall harvest sharing and non-Indian harvest levels can be seen by a review of the results of the 1980 and 1981 ocean salmon fishery off the Washington coast. For these years (prior to the court decisions the

Association petitions this Court to review), the Secretary adopted a different, less impacting, allocation format as a basis of his management regulations. A "single species, regional aggregate" approach, designed to return at least 50% of the harvestable numbers of each species to the "aggregated" or "regionalized" coastal river systems involved in this case, was utilized. Thus, instead of a requirement to return at least 50% of the harvestable numbers of the weakest run anywhere in the coastal river systems, the Secretary attempted to provide a return of at least 50% of the harvestable numbers of the weakest species to the north Washington coastal region rivers as a whole.[3]

As a result of application of this approach by the Secretary in 1980, the

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[3]While, as compared to the run-by-run approach, this system offered some additional flexibility and ability to equalize harvests, it again insured the treaty Indians would harvest over 50% of all species but the weakest.

coastal tribes harvested 50% of the coho, 70% of the chinook, 80% of the chum[4] and 100% of the sockeye salmon which would otherwise have returned to the coastal streams. The treaty tribes' share of the total harvest of salmon stocks emanating from the coastal rivers was 62% in 1980 and 64% in 1981. These percentages do not include the steelhead trout harvests for which Indian harvest proportions were substantially greater. They would have been substantially greater had run-by-run management been adopted by the Secretary in these years.

A more direct indication of the likely effect of run-by-run allocation in a mixed stock ocean fishery situation is presented by the 1981 season. As admitted by the Secretary, and the amici tribes, changing

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[4]While chum salmon does not bite on hook and line, and thus was not harvested by non-Indian ocean or in-river fisheries, it is harvested within Grays Harbor, the sole coastal non-Indian net fishery.

the Secretary's single species, regional aggregate approach to run-by-run management in the 1981 season would have required the coho quota off the coast of Washington to be reduced from 620,000 fish to 260,000 fish.[5] Thus, in order to provide the Hoh River the additional 1,150 coho necessary to allow a 50% tribal coho harvest on that stream in 1981, a reduction in the non-Indian ocean harvest of 360,000 coho and corresponding thousands of other species would have been required.[6] Had this occurred, the disparity in favor of treaty Indian harvest would have been far greater than the 64/36 ratio which

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[5]This was part of the relief requested by the tribes when they challenged the Secretary's 1981 regulations in Hoh v. Baldrige, 522 F. Supp. 683 (W. D. Wash. 1981).

[6]This reduction would have been required in spite of the fact that, even at the Secretary's 620,000 coho quota level, the Hoh Tribe would have received well in excess of 50% of the total harvest of treaty fish returning to the Hoh River.

actually occurred under the Secretary's plan.

In addition to the transfers of harvest to coastal Indian fisheries, these reductions in ocean harvest caused by application of run-by-run management cause tremendous transfers of harvest from the ocean fishery to other domestic and foreign fisheries. The record in this case demonstrates that the 360,000 coho reduction which would have occurred in the 1981 ocean fishery due to application of the run-by-run approach would have resulted in an additional transfer of coho harvest to Canadian fisheries of approximately 40,000 coho.[7] Still greater numbers would have been transferred to the Puget Sound fishery by this

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[7]The Secretary's single species, regional aggregate approach had already caused a similar level of coho transfer to Canadian fisheries when compared to an aggregation format which aggregated among species in order to maximize harvest while still allowing a 50% tribal harvest and appropriate escapements. Also, unquantified transfers of other species to the Canadian harvest would have occurred.

change.

The allocation approach advocated by the Association is that of a regional, species aggregate system. This approach would adopt a flexible ocean management scheme designed to return enough harvestable fish to the coastal streams so that each coastal Indian fishery could harvest 50% of the overall harvestable fish (by weight, number, or commercial value) subject to its treaty rights. If, for example, large transfers to the Canadian fishery could be avoided by allowing the non-Indian fishery to catch more than the 50% of certain coastal coho runs, this allocation scheme would allow a greater than 50% treaty Indian harvest of some other runs or species to offset that deficit. While each tribe would not harvest 50% of each run returning to its usual and accustomed places of fishing, it would be able to harvest 50% of the total fish so

returning.[8] Such an allocation system would protect the treaty rights of the non-Indians to up to 50% of the resource, while also protecting the non-Indians' right to 50% of the harvest and preventing massive transfer of harvest to foreign fisheries.

The critical need for a different management approach can be clearly demonstrated on more than a legal rights basis. The progressively more restrictive ocean harvest regulation of the non-Indian fishery by the Secretary has led to very dramatically declining harvests by ocean recreational fishermen as well as a declining participation of such fishermen in the fishery. Compared to five-year averages for the period preceding initiation of federal regulation under the FCMA, recreational

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[8]Past harvest statistics clearly demonstrate that 50% aggregate harvests by each tribe could be accomplished using this approach without disrupting present, place-specific fishing patterns.

angler effort, that is, participation of sportsmen in the fishery, has declined from 482,000 angler trips in 1971-75 to 206,000 angler trips in 1982, a 57% decline. Declines in harvest are even more dramatic. Recreational chinook and coho harvest has steadily declined each year from approximately 777,000 for the 1971-75 average to less than 300,000 in 1982, a 61% decline. The season duration has also sharply declined from an average of 201 fishing days in 1971-75 to a 1982 season for Ilwaco fishermen of 44 days and a Westport season of 83 days. Harvest limits of three fish have been reduced to two fish.[9]

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[9]The declines in ocean harvest levels are clearly the result of federal regulation rather than any general decline in resource abundance. These regulations are causing a transfer of harvest away from those industries the Secretary was required by the FCMA to promote and into other fisheries, including foreign fisheries. While the harvest of non-Indian ocean fisheries has plummeted, and in spite of weak coastal runs, the coastal tribes in-river harvest has gone up some 43% and 35% above its 1971-75 levels in 1980 and 1981, respectively. The tribal

The effect of these changes has been devasting to the ocean recreational salmon fishing industry. Sixty percent of the Washington charterboat fleet has gone out of operation since 1977. Tremendous impacts on the economy of the local communities such as Westport and Ilwaco have occurred and impacts to the tourism industry throughout the state

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ocean fishery has increased much more. Furthermore, unlike the Puget Sound situation dealt with in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), these increases do not result because the coastal tribes had been essentially frozen out of a substantial share of the harvest prior to that decision. Not only have the Indian coastal fisheries traditionally harvested a substantial portion of the coho and chinook salmon, they have harvested nearly all the sockeye and chum salmon runs on the north coastal streams as well as the vast majority of steelhead trout which is also a species subject to Indian treaty fishing rights.

The Puget Sound commercial fishermen have also benefited greatly from these transfers out of the ocean sports fishery. The commercial net fishery harvest of chinook and coho in Puget Sound increased by approximately 52% or 1.5 million fish.

have been substantial. The industry simply will not be able to withstand even several more years of run-by-run allocation of the coastal salmon stocks.

ARGUMENT

This case presents a situation where the Ninth Circuit Court of Appeals has decided an extremely important issue of federal law which has not been, but should be, settled by this Court. Furthermore, the Court of Appeals has decided this case in a manner which would render meaningless certain fundamental treaty rights of non-Indian fishermen which have previously been confirmed by this Court. As such, an important conflict with applicable decisions of this Court results from the judgment below.

This Court has not previously reviewed the critical and complex legal issues surrounding the relationship between Indian treaty fishing rights and the FCMA's

statutory standards pursuant to which the Secretary is required to regulate the ocean salmon fishery off the coast of Washington. At the time of the seminal U.S. v. Washington decision, 384 F. Supp. 312 (W.D. Wash. 1974), the FCMA was not yet enacted. While the FCMA was mentioned in this Court's review of U.S. v. Washington in Fishing Vessel (443 U.S. at 688), this was only in the context of the existence of a duty to manage the ocean to assure compliance with the treaties. There was no discussion or analysis of what management measures would be required to assure that the Secretary met his obligations under both the Indian treaties and the FCMA. There was also no consideration of the special circumstances of the mixed stock ocean fishery and how these circumstances affect the management necessary to assure "fair share" allocation of harvest between Indian and non-Indian fishermen.

The proper resolution of the issues regarding the relationship between the Secretary's obligations under the FCMA and the Indian treaty rights is crucial to the citizens of the State of Washington. Since, as set forth above, the management measures undertaken to meet these obligations[10] have dramatically different impacts on the non-Indian fisheries, the very existence of the non-Indian ocean sports fishery is dependent on how these issues are resolved (as is the existence of the non-Indian ocean commercial salmon fishery). Such resolution will, therefore, have a resounding impact on the socio-economic fabric of Washington's coastal communities, the Washington sports fishing community, and the Washington tourism industry. In light of their extreme importance, these critical issues deserve, and

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[10]As will be set forth below, prior decisions of this Court make it clear that treaty obligations can be met by management formats other than run-by-run allocation.

require, consideration by this Court.

The other important reason for granting review in this case is that the courts below have taken an improper view of this Court's decision in Fishing Vessel, a view which, if allowed to stand, would totally emasculate the treaty rights of non-Indians to a fair share of the harvest as set forth in Fishing Vessel. By its failure to properly interpret this Court's decision in Fishing Vessel, the Ninth Circuit has required a fishery allocation format which ensures that the non-Indian fishery can never harvest anything close to its fair share of the coastal salmon runs subject to the Indian treaty rights. By its inappropriate reliance on isolated portions of the opinion in Fishing Vessel, the Ninth Circuit has thus guaranteed that the non-Indians treaty right to at least 50% of the harvest on those stocks cannot be attained unless this Court

grants review and reverses the decision below.

A. The Decisions Below Ignore the Fundamental "Fair Share" Principle of Treaty Fish Allocation Enunciated by this Court.

Article III of the Treaty of Olympia, concluded between the United States and the Quinault and Quileute tribes in 1856, provides as follows:

> Article III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. . . .

Treaty of Olympia, July 1, 1855, Jan. 25, 1856, United States-Quinault and Quileute Indian Tribes, 12 Stat. 971.

In arriving at its conclusion that the Treaty of Olympia requires the Secretary to manage the ocean fishery to pro-

vide run-by-run allocation of coastal fish stocks,[11] the Ninth Circuit relied nearly

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[11]It is not entirely clear whether the Ninth Circuit considers run-by-run allocation to be an absolute rule. At various portions of its opinion, the court states that the run-by-run approach is required by the treaties. 702 F.2d at 822, 824. However, the court also states that the aggregate approach offered by the Association is precluded by the treaties as "the exclusive rule" of salmon allocation, suggesting perhaps some flexibility in this regard. It also notes that the Secretary and Washington State have been expressly invited by the District Court to seek relief whenever a departure from the usual rule is warranted. 702 F.2d 823. Any such flexibility is, however, of no avail to the Association since the District Court, where continuing jurisdiction over this issue is maintained, has already denied its intervention, which denial was upheld by the Ninth Circuit and a petition for certiorari to this Court denied. Hoh v. Baldrige, No. C81-742 (W.D. Wash. July 23, 1981), Washington State Charterboat Assoc. v. Hoh, No. 81-3459 (9th Cir. Mar. 15, 1982), cert. denied, 103 S.Ct. 141 (1982). The Association cannot, therefore, reduce the impact of the run-by-run approach by application to the court as suggested in the Ninth Circuit decision. 702 F.2d 823, footnote 6. Even if the Association could apply to the court for a modification of the run-by-run rule in a given year, it is simply nonsensical to require such modifications be sought each year when the situation on the Washington coast is such that run-by-run allocation is impermissible as a violation of both the FCMA and non-Indian treaty rights as a matter of definition in all years.

totally on its interpretation of the following isolated language in Fishing Vessel:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. (emphasis supplied).

443 U.S. at 679. However, a review of the remainder of Fishing Vessel, and the U.S. v. Washington decision which it largely upheld, clearly demonstrates that this reference to "each run" was not intended to require an actual 50% sharing of the harvest of each run in all circumstances, so long as a harvest equivalent to such fair share of each run is provided by whatever allocation format is adopted. Rather, the fundamental principle which cannot be violated is that both the Indian and non-Indian fishermen receive a fair share of the harvest of fish that would otherwise return to the tribes' usual and

accustomed fishing grounds. As discussed above, this fundamental principle simply cannot be complied with using run-by-run management of the ocean fishery since the non-Indian would not be able to harvest his fair share.

The Ninth Circuit Court of Appeals decision below fails to recognize that the "fair share" principle developed by this Court must be the primary factor in determining what management measures are required to implement treaty obligations to both the Indian and non-Indian fishermen. This principle found its genesis in U.S. v. Washington. Judge Boldt in U.S. v. Washington held that the treaty language reserving to the treaty Indians a right to take fish "in common" with "all citizens of the territory" means sharing equally the opportunity to take fish at "usual and accustomed grounds and stations." 384 F.

Supp. at 343. In establishing this equal sharing as the basic principle of Indian treaty rights, the court recognized the difficulty inherent in developing an allocation or management scheme to implement this basic right in the case area:

> While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience.

384 F. Supp. at 343 (emphasis supplied).

This Court has since modified the equal sharing principle of U.S. v. Washington. In Fishing Vessel, this Court examined the "equal share" principle announced in U.S. v. Washington and modified

it to be a "fair share" principle:[12]

> The purport of our cases is clear. Non-treaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right to access to the reservations to destroy the rights of other "citizens of the territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

443 U.S. at 684-5 (emphasis supplied.)

It is abundantly clear that application of the run-by-run allocation principle would violate the fundamental "fair share" principle since, as detailed above at pages 11-18, it would, by definition, deprive

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[12]Unlike the District Court, this Court refused to designate a definite percentage of harvest necessary to constitute the "fair share" of the Indian treaty right, but instead put a ceiling of 50% on such allocation with the level to be determined by that necessary to provide a "moderate living." 443 U.S. at 685.

the non-Indian of anything near his "fair share" of any but the weakest of the runs returning to the north coastal streams. The Ninth Circuit decision simply does not address this very basic flaw in the application of run-by-run allocation to the circumstances of the ocean fishery.[13]

A review of U.S. v. Washington and Fishing Vessel makes it clear that the way to harmonize the Court's language regarding rights to "each run" of fish with the basic "fair share principle" as applied to the ocean fishery is to recognize that the share of each run is a measure of the quantity of the right rather than a directive as

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[13]The Ninth Circuit decision also does not explain why, since run-by-run management cannot result in an equal sharing of a given run, management must always be accomplished to provide the treaty Indians with the excess share. This result, avoided by use of an aggregate allocation system, is certainly in conflict with this Court's conclusion that both Indian and non-Indian fishermen have equal treaty rights to a fair share of the resource.

to how the fish harvest must actually be managed. For example, if five different runs of 2,000 fish each would otherwise return to a tribe's usual fishing grounds, the tribe would have a total right measured by the sum of one-half the number of fish in each run (5,000 fish), but if equal sharing of each run was not practical or feasible, this right could be satisied by providing the tribe with a harvest of 5,000 fish even if they did not get precisely 1,000 fish from each run.

While Judge Boldt in U.S. v. Washington adopted an "equal sharing principle" similar to this Court's fair share principle, he implemented that principle in the case area[14] through a combination of

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[14]The court in U.S. v. Washington only adopted division and allocation schemes to implement this principle for the case area (comprising the territorial waters of the State of Washington) and specifically excluded the ocean fisheries now subject to the Secretary's jurisdiction under the FCMA.

regional, aggregate allocation and run-by-run allocation depending on the circumstances involved.[15] In a pre-FCMA, 1976 order, Judge Boldt made it clear that aggregation of runs was permissible on a regional basis:

> 2. Are shares to be calculated separately for chum salmon stocks that differ in the timing of their runs?
>
> Response:
>
> No--not for stocks within the same region or river system or a combination described above--but they shall be managed separately.
>
> . . .
>
> 4. Are shares to be calculated on a stream-by-stream basis, a regional basis, or for the case area?

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[15]The probable reason that Judge Boldt in U.S. v. Washington attempted to provide harvest of each run when practical was to avoid the necessity of comparing the value of fish "traded" between runs to meet the treaty obligation. When each run can practically be shared evenly, one need not worry about fish from one run being heavier or worth more than fish from other runs. However, adjustments to reflect equal value can be made when it is not possible to evenly divide each run such as is the case with the ocean fishery.

Response:

> The shares which treaty and non-treaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river system by river system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs. Further clarification is presented in the responses below. In some cases, for more effective management or because data for stock separation do not exist, the sharing must be on a regional basis.

459 F. Supp. 1020, 1070 (1978) (emphasis supplied). Judge Boldt fully recognized that a run-by-run allocation could not feasibly result in equal sharing even in the case area where separated stock net fisheries predominate for both Indian and non-Indian. He therefore adopted a regional aggregate approach for part of the Puget Sound region, similar to that sought for the north coastal streams by the Association.

Noting the need to devise apportionments that assured the Indians'

reasonable livelihood needs would be met, this Court clearly approved Judge Boldt's allocation (which included the regional aggregate approach in much of the Puget Sound area):[16]

> The division arrived at by the district court is also consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources. In those cases, after determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the court typically ordered a trial court or special master, in his discretion to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met [citations omitted].
>
> This is precisely what the District Court did here, except that it realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right

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[16]It is interesting to note that the regional aggregate allocation devised by Judge Boldt was here noted by the Court to be consistent with the same cases the Court cited to support the language regarding "each run," which language the Ninth Circuit felt required a run-by-run approach--the antithesis of the regional aggregate.

of "all other citizens of the territory."

443 U.S. at 685-6 (emphasis supplied.)

Thus this Court has clearly recognized that a run-by-run allocation approach is not required to comply with the "fair share" principle and that regional aggregation can be used when necessary. Such aggregation is clearly necessary in the case of the mixed stock ocean fishery and the north coastal stocks, since, without it, the non-Indian fisherman simply cannot harvest their fair share of the resources.

B. Run-by-Run Allocation Is Directly Contrary to the Basic Requirements of the FCMA.

The decisions by the courts below totally ignore the key fact, which was admitted by the Secretary, that the great reduction in ocean harvest caused by run-by-run allocation results in a very substantial transfer of harvest into foreign fisheries. This transfer of harvest to foreign fisheries

constitutes a clear violation of National Standard 1 of the FCMA which requires that Secretary's regulations to achieve the "optimum yield" to the nation's fisheries.[17]

The congressional purposes in promulgating the FCMA are contained in 16 U.S.C. § 1801(b). Included in these purposes are:

> (3) To promote domestic, commercial and recreational fishing under sound conservation and management principles;
>
> (4) To provide for the preparation and implementation, in accordance with national standards, of a fishery management plan which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.

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[17]The Ninth Circuit improperly focuses only on transfer of harvest to other Washington state fisheries when concluding that the optimum yield argument ignores the physical realities of the salmon life cycle such as the fact that harvestable fish in ocean waters are the same fish that return to the streams of Washington state to spawn. 702 F.2d at 823. The transfer of harvest into foreign fisheries is the thrust of the Association's argument regarding optimum yield. Id.

Id. The Secretary is required to insure that the plan comports with seven national standards,[18] including:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
>
> . . .
>
> (4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign privileges among various United States fishermen, such allocation shall be: (a) fair and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a).

The term "optimum yield" was defined by Congress as follows:

> The term "optimum," with respect to the yield from a fishery,

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[18]Not goals as suggested by the Ninth Circuit in its decision below. 702 F.2d at 823.

means the amount of fish--

> (A) Which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities; and
>
> (B) Which is prescribed as such on the basis of the maximum sustainable yield from such fishery as modified by any relevant economic, social, or ecological factor.

16 U.S.C. § 1802(18). Legislative history further explains the concept of optimum sustainable yield:

> The concept of optimum sustainable yield is, however, broader than the consideration of the fish stock and takes into account the economic well-being of the commercial fishermen, the interests of the recreational fishermen, and the welfare of the nation and its consumers. . . .

H.R. Rep. No. 445, 94th Cong., 1st Sess. 48-49.

As the preeminent national standard, optimum yield therefore requires the consideration of many factors. All of these factors are totally inconsistent with

management of the ocean fishery to provide run-by-run allocation on the Washington coast.

Domestic food production on a continuing basis is a primary consideration upon which to measure the compliance of the Secretary's regulations with optimum yield requirements of the FCMA. As set forth earlier in this petition, run-by-run allocation causes extremely large transfers of harvest to foreign fisheries. This transfer is certainly inconsistent with the optimum food production requirements of the FCMA which, as set forth above, look only to the food production to the nation.[19]

The FCMA also requires that recreational benefits must be optimized on a continuing basis in order to comply with the optimum yield standard. By drastically

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[19]One of the primary purposes of the FCMA, as noted by the Ninth Circuit decision below, was to limit the harvests by foreign fishermen. 702 F.2d at 824.

reducing the ocean quota, run-by-run allocation would serve to minimize, if not eliminate, the vast majority of recreational harvest on ocean stocks. As such, the inconsistency with the preeminent optimum yield national standard could not be more clear.

The FCMA also prescribes that optimum yield determinations must include consideration of relevant economic and social factors of the commercial and recreational fisheries. As set forth above, run-by-run management has a devastating impact on the ocean recreational fishery and the charter-boat industry. It is clear this industry cannot continue to survive the economic hardship which will result from run-by-run allocation. Similar impacts will occur to the non-Indian ocean troll fishery and the economy it supports. The potentially devastating social and economic impacts of a management scheme which would displace the

charterboat industry and the troll fishery in the state of Washington must be considered to be in violation of the optimum yield requirements of the FCMA.

National Standard 4 of the FCMA requires that the fishery management plans adopted by the Secretary not discriminate among fishermen, be fair and equitable to all such fishermen, and be carried out so that no entity acquires an excessive share of the resource. The Association believes that a management plan which provides the coastal treaty Indians with far more than their 50% share of the harvest of coastal treaty fish is not only in violation of treaty rights, as set forth above, but is discriminatory, inequitable, and provides the coastal tribes an excessive share of the fish, all in violation of this national standard under the FCMA. In addition, the fact that run-by-run management causes large transfers to commercial fisher-

men in Puget Sound also constitutes a violation of National Standard 4.

It is therefore clear that the requirement for run-by-run allocation of harvest in the north Washington coastal fisheries would result in violations of the Secretary's duty under the national standards set forth in the FCMA. Regional aggregate allocation would be consistent with these national standards while at the same time providing the tribes their rights to 50% of the fish which would otherwise return to their usual and accustomed places of fishing. Optimum yield could be obtained along with a fair and equitable distribution of harvest. While the tribes would still get all of the fish they are entitled to under the treaties, the non-Indian harvest could be maintained in a fashion which would avoid the severe socio-economic impacts associated with run-by-run management.

C. The Indian Treaty Rights and the FCMA Must Be Construed Consistently, If Possible, But If the Indian Treaty Rights Are Held To Require Run-by-Run Allocation, Then Such Treaty Rights Have Been Modified by the FCMA.

It is the contention of the Association that the Secretary must comply with the requirements of both the treaty rights and the FCMA wherever possible, and that if such requirements are totally inconsistent, then the treaty must be deemed modified to the extent of the inconsistency. In this case, however, no such inconsistency exists. An aggregate approach to meeting the fair share principle of the Fishing Vessel case avoids most of the very substantial transfer of harvest to foreign fisheries caused by the application of run-by-run allocation. Since an aggregate approach to allocation is permissible under treaty fishing rights, as discussed above, using an aggregate approach one can both meet the require-

ments of the treaties as well as the optimum yield requirements of the FCMA.

However, if the treaty does indeed require run-by-run allocation, then it must be deemed modified by the FCMA insofar as necessary to remove the inconsistency with the national standards. It is well accepted that federal treaties and statutes have the same status under the U.S. Constitution and that Congress has the power to modify or abrogate Indian treaties by subsequent enactment. See, e.g., Reid v. Covert, 354 U.S. 1, 18 (1957); U.S. v. Fryberg, 622 F.2d 1010 (9th Cir. 1980). As stated in Reid v. Covert, supra:

> This court has also repeatedly taken the position that an act of Congress, which must comply with the Constitution, is on a fully parity with a treaty, and that when a statute which is subsequent in time is inconsistent with the treaty, the statute to the extent of conflict renders the treaty null.

354 U.S. at 18.

In Fryberg, the Ninth Circuit concluded that the Eagle Protection Act modified Indian treaty rights to take eagles. Given the overriding purpose of the Eagle Protection Act to insure the protection of the Bald and Golden Eagles, the court concluded that the Eagle Protection Act modified and abrogated the treaty right to take, shoot, and kill eagles. The court reached this conclusion even though neither the statutory language nor the legislative history expressly stated that Indian treaty rights were to be modified or abrogated.

The overriding purpose of the FCMA is to provide an overall fishery conservation and management program which will be in the best interests of the nation by sustaining the optimum yield from the fishery while providing for the maintenance of a viable recreational and commercial fishery. 16 U.S.C. § 1801. Just as in the Fryberg

case, supra, this overriding congressional purpose would be totally thwarted by an interpretation of the treaty requiring run-by-run allocation. Therefore, if the treaty requires that run-by-run allocation be applied to the ocean fishery, the treaty must be deemed modified by the clearly inconsistent requirements of the FCMA.[20]

CONCLUSION

The decisions of the courts below fly in the face of this Court's previous holdings regarding the non-Indians' treaty right to a fair share of the fishery harvest as well as the FCMA's requirements for optimum yield to the domestic fishery and fair and equitable distribution among U.S. fishermen. If review of these decisions is not

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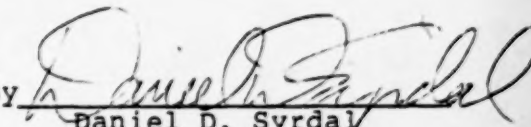
[20]As was also the case in Fryberg, this case does not present a substantial modification of Indian treaty rights even if run-by-run allocation was otherwise required by the treaty. Under a regional, species aggregate approach, the treaty tribes would still receive 50% of the total harvest.

granted by this Court, and these decisions overturned, the non-Indian fishing industry off the coast of Washington will cease to exist as we know it. The fate of these industries, and the social and economic well-being of all those citizens of the state of Washington which rely thereon, is therefore dependent upon review by this Court.

Respectfully submitted,

SYRDAL, DANELO,
KLEIN & MYRE, P.S.

By 
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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff, v. MALCOLM BALDRIDGE, Secretary of Commerce, Defendant.	)	No. C81-836 V ORDER

[Entered February 12, 1982]

This case is before the Court on cross-motions for summary judgment. The Hoh and Quileute Indian Tribes and the Quinalt [sic] Indian Nation have filed a memorandum as amicus curiae opposing plaintiff's motion for partial summary judgment.

Having reviewed the motions and memoranda in support thereof and being fully informed, the Court hereby orders that plaintiff's motion for partial summary

judgment is denied and that pursuant to Rule 56(b), Federal Rules of Civil Procedure, defendant's motion for summary judgment is granted as to plaintiff's third cause of action. The reason for granting defendant's motion as to the third cause of action is set forth in the following.

Plaintiff acknowledges at page 8, lines 7-17 of its reply brief that the declaration it seeks in this action, that is, that defendant must adopt regulations for the Washington ocean fishery based on a regional, aggregate species approach, would necessarily be inconsistent with the Court's order in Hoh v. Baldridge, ____ F. Supp. ____, (W.D. Wa. 1981), No. C81-742R(C). In Hoh, the Court held that the treaty right of the plaintiff tribes was a right to take approximately 50% of each run of salmon, managed on a river system by river system, run by run basis. See page 2, paragraph 4 of the

Declaratory Judgment and Decree. While recognizing that this rule is not inflexible, the Court finds that this case is indistinguishable from Hoh and is not otherwise persuaded that it should not adhere to the holding of Hoh.

Finding no material issue of fact presented, and based on Hoh, supra, United States v. State of Washington, 459 F. Supp. 1020, 1070 (W.D. Wa. 1978), and Washington v. Washington State Passenger Fishing Vessel Association, 443 U.S. 658, 679 (1979), defendant's motion is granted as to the third cause of action and plaintiff's is denied.

There being no just cause for delay, the Court hereby directs the entry of final judgment pursuant to Rule 54(b) as to the third cause of action of plaintiff's complaint.

IT IS SO ORDERED.

DATED at Phoenix, Arizona this /s/ 12th day of February, 1982.

/s/_____
Walter E. Craig
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff, v. MALCOLM BALDRIDGE, Secretary of Commerce, Defendant.	No. C81-836 JUDGMENT

[Filed February 19, 1982]

This matter having come on for consideration before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having beenn duly considered and a decision having been duly rendered, defendant's motion for summary judgment is granted as to plaintiff's third cause of action.

IT IS HEREBY ORDERED AND ADJUDGED, summary judgment is entered as to plaintiff's third cause of action.

DATED this 19th day of February, 1982.

/s/_____
Diane Boyd
Deputy United States District Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant,	)	No. 82-3115
v.	)	D.C. No. C81-836
MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	OPINION

[Filed March 29, 1983]

Appeal from the United States District Court
Western District of Washington
Hon. Walter E. Craig, Judge Presiding
Argued and Submitted: January 6, 1983

Before: BROWNING, Chief Judge, and FLETCHER and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

Appellant Washington State Charterboat Association is an organization of Washington State citizens who operate offices and vessels serving ocean sport anglers. The Association brought this litigation to compel the Secretary of Commerce (Secretary) to

revise the federal management plan for salmon fishing off the coast of Washington. Specifically, the Association seeks to substitute an "aggregate" approach for the "run-by-run" approach used by the Secretary to determine the portions of each North Pacific salmon harvest allocated to various Indian tribes under the federal plan. According to the Association, the run-by-run approach is not required by the treaties that established the Indians' fishing rights and is inconsistent with the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1802 (Magnuson Act). These legal issues were argued to the district court on cross-motions for summary judgment. The district court granted summary judgment in favor of the Secretary. The Association appeals. We affirm.1/

I.

This action arises from a history of controversy between treaty and nontreaty fishers in Washington State over the division of fishing rights. See, e.g., S. Rep. No. 667, 96th Cong., 2d Sess. 2 (1980). Treaties negotiated by Governor Isaac Stevens between the United States and several Pacific Northwest Indian tribes in the 1850s establishing the rights of the treaty fishers.2/ In 1970 the United States, on its own behalf and as trustee of seven Indian tribes, initiated litigation to clarify the treaty fishers' rights. See United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ("final" decision) (Boldt, J.), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); United States v. Washington, 459 F. Supp. 1020, 1020-1130 (W.D. Wash. 1974-1978) (post-trial decisions), various appeals dismissed, 573

F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), various appeals aff'd sub nom. Puget Sound Gillnetters Association v. United States District Court, 573 F.2d 1123 (9th Cir. 1978) (aff'g decisions at 459 F. Supp. at 1097-1118 (W.D. Wash. 1977-78)), aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (hereinafter Fishing Vessel). The litigation culminated in the holding that treaty fishers have a right to a share of each run of anadromous fish[3] that passes through the "usual and accustomed" Indian fishing sites. Fishing Vessel, 443 U.S. at 685.

This action represents at least the second effort of the Association[4] to challenge the Secretary's approach in allocating a portion of each annual harvest to

treaty fishers.5/ The Association complains that the run-by-run approach forces the Secretary to call an early halt to each year's ocean harvest by nontreaty fishers to protect individual runs of the depressed species, viz., chinook and coho. (The chinook and coho are line-biting fish and are thus the salmon species of primary interest to the Association.) The Association cites, for example, the Secretary's plan for the 1981 ocean harvest off the coast of Washington. The plan provided for a commercial season from May 1 to May 31 for all salmon species except coho and for all species from July 15 to September 1, subject to closure whenever the coho harvest reached 372,000 fish. 46 Fed. Reg. 30,633, 30,641-42 (1981). The plan also provided for a recreational season from May 23 to September 7, with a daily bag limit of two salmon (three north of the Queets River, only two of which could be chi-

nook or coho). This season was subject to closure whenever the harvest of coho reached 248,000 fish. Id.

The Association contends in this appeal that the Secretary should use an aggregate approach that would give the region's treaty fishers roughly half of the total salmon harvest, i.e., half of the harvest of all species, including chum and sockeye. Under the Association's aggregate approach, treaty fishers would be compensated for loss of their usual stream-harvested share of the chinook and coho through an allocation of more than half of the chum and sockeye. According to the Association, an aggregate approach is permitted by the Stevens treaties and is required by the Magnuson Act. The Association argues alternatively that, if the Stevens treaties do not permit an aggregate approach, they have been, to that extent, abrogated by the Magnuson

Act.

II.

The Association's proposed aggregate approach is precluded by the treaties negotiated by Governor Stevens with the Indians. All of these treaties provide that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, n common with all citizens of the Territory . . . ." Treaty of Medicine Creek, art. III, 10 Stat. 1133 (quoted in Fishing Vessel, 443 U.S. at 674). Fishing Vessel provides the controlling construction of this critical treaty provision. The Court there declared, "In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." Id. 443 U.S. at 679 (emphasis added). The Court further held that the

Indians' treaty share of each run is presumptively half but that this presumptive share should be reduced whenever tribal needs would be satisfied by a lesser amount. Id. at 685-86. Thus, the Indians' treaty share is a "fair share" of each run. Id. at 684.

The Association argues that by substituting a "fair share" for a fifty-fifty, treaty-nontreaty division of fish originally proposed by the district court in United States v. Washington, 384 F. Supp. 312, the Supreme Court somehow abandoned the run-by-run approach. Nothing in the Court's opinion supports this interpretation of Fishing Vessel. In discussing the very issue of the Indian's "fair share," the Court stated:

> We also agree with the Government that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and nontreaty shares, and should then

> reduce the treaty share if tribal needs may be satisfied by a lesser amount.

Fishing Vessel, 443 U.S. at 685 (emphasis added).

The Association next contends that, because the line of cases leading up to Fishing Vessel addressed issues concerning fishing in the interior waters of Washington State and did not involve ocean waters under the jurisdiction of the United States, the Secretary must divide the harvest of fish as the Association proposed in order to achieve the Magnuson Act goal of the "optimum yield." 16 U.S.C. § 1851(a)(1) (1976). This argument ignores not only the physical realities of the salmon life cycle, viz., the fact that harvestabl fish in ocean waters are the same fish that return to the streams of Washington State to spawn, but also the fact that the Court expressly included ocean catches in the allocation of fish. Fishing Vessel, 443 U.S.

at 688.

The Association also asserts that the district court's orders in United States v. Washington, 384 F. Supp. 312, do not require run-by-run allocations of fish. The Association relies on various statements of the district court regarding the need for flexibility in allocating harvest shares to respond to special local circumstances. Contrary to the position of the Association, however, the district court clearly adhered to the right of each tribe to take a share of each run passing through tribal fishing sites as the regional rule of allocation. Hoh Indian Tribe v. Baldridge, 552 F. Supp. 683, 689 (W.D. Wash. 1981). The Secretary and Washington State have been expressly invited by the district court to seek relief in that court whenever a departure from the usual rule is warranted by, among other concerns, the needs of nontreaty fishers.6/ Id.

The Association next argues that the run-by-run approach was treated in Fishing Vessel simply as a means of calculating the treaty fishers' overall harvest share, not as a rule for determining a "fair share" of salmon that individual tribes could take from their "usual and accustomed" fishing sites. The Association's interpretation of the right to take fish "in common" is indistinguishable from the hypertechnical readings of treaty language that have been rejected by the Supreme Court. See Fishing Vessel, 443 U.S. at 675-78.

In short, the Stevens treaties preclude adoption of an aggregate approach as the exclusive rule of salmon allocation.

III.

Finally, the Association maintains that the run-by-run approach diminishes the overall annual harvest and is, as a consequence, inconsistent with the Magnuson's

Act "optimum yield" goal, 16 U.S.C. § 1851(a)(1) (1976). Therefore, the Association contends that, to the extent the Stevens treaties require a run-by-run approach, they were abrogated by the Magnuson Act.

Congress' intent to abrogate or modify an Indian treaty must be clear. Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968). Such an intent may be found in the express provisions of an act or in its surrounding circumstances and legislative history. United States v. Fryberg, 622 F.2d 1010, 1016 (9th Cir. 1980). There is, however, nothing in the language of the Magnuson Act or in its legislative history that even remotely suggests that Congress intended to abrogate or modify the Stevens treaties. On the contrary, the Magnuson Act expressly provides that each fishery management plan approved by the Secretary shall be

consistent with all provisions of the Act and "any other applicable law." 16 U.S.C. § 1853(a)(1)(C) (1976). Such "other law" includes the Stevens treaties.

The purpose of the Magnuson Act was to protect United States fisheries by extending the exclusive fisheries zone of the United States from 12 to 200 miles and to provide for management of fishing within the 200-mile zone. H.R. Rep. No. 445, 94th Cong., 1st Sess. 21 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News 593, 593-94. The extension of the zone indicates that Congress was concerned about harvests by foreign fishers, not catches by treaty fishers. Five years later, relying on the assumption that treaty fishers have a right to take a "fair share" of each annual harvest, Congress decided to assist nontreaty fishers by enacting the Salmon and Steelhead Conservation and Enhancement Act of 1980,

Pub. L. No. 96-561, 94 Stat. 3275 (in part amending the Magnuson Act; codified in scattered sections of titles 15, 16 and 46). See H.R. Rep. No. 1243, 96th Cong., 2d Sess. 12, 18 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 6793, 6794, 6810.

The district court was correct in granting summary judgment in favor of the Secretary. The run-by-run approach for allocating salmon is required by the Stevens treaties and has not been abrogated by the Magnuson Act. Thus, we AFFIRM.

FOOTNOTES

1. Summary judgment is appropriate where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 882 (9th Cir. 1980). Here, the parties agreed to the facts.

2. The United States entered into the treaties with the Indians to extinguish the last conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now Washington State. The treaty with amici (who are treaty fishers of the Quinault Indian Nation, the Hoh Indian Tribe, and the Quileute Indian Tribe) is the Treaty of Olympia, July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971. See United States v. Washington, 384 F. Supp. 312, 349 (W.D. Wash. 1974).

3. "Anadromous fish" are fish which are spawned or artificially produced in freshwater, reach maturity in the ocean, and then return to their water of origin to spawn. See 384 F. Supp. at 405. A "run" is a group of anadromous fish on their return migration, identified by species, race, and water of origin. See id.

4. The Association tried to intervene in Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981) (Craig, J.), in which amici in this appeal challenged the Secretary's 1981 harvest plan, seeking reductions in either the ocean harvest limits or Washington State's spawning escapement goals. When the Association appealed the district

court's denial of its motion to intervene, this court held that the Association's challenge was foreclosed by the line of cases leading up to Fishing Vessel and by Fishing Vessel itself. Hoh Indian Tribe v. Baldrige, No. 81-3459 (9th Cir. Mar. 15, 1982) (memorandum) cert. denied, ____ S. Ct. ____ (1982). The panel described the Association's effort as a "thinly-veiled" attempt to "relitigate issues that have previously been decided." Id.

5. The relevant duties of the Secretary are set forth in the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801-1882, which charges the Secretary with responsibility for establishing annual harvest plans for each ocean fishery consistent with the goals established by the Act. The goals include achievement of the "optimum yield" from each fishery, 16 U.S.C. § 1851(a)(1) (1976), and a fair allocation of fishing privileges among all United States fishers, id. § 1851(a)(4)(A). In addition, the Secretary must determine that each plan is consistent with "any other applicable law." Id. § 1854(b).

6. Appellants may be able to reduce the impact of the run-by-run approach to some extent by agreement with the Secretary and the affected tribes or by application to the court for modification of the Secretary's plan. See Hoh Indian Tribe v. Baldrige, 522 F. Supp. at 690.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	No. 82-3115 DC CV 81-836 Craig JUDGMENT

[Filed and Entered June 22, 1983]

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in

this Cause be, and hereby is affirmed.

Filed and entered March 29, 1983.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	No. 82-3115 ORDER

[Filed June 9, 1983]

Before: CHIEF JUDGE BROWNING and FLETCHER and PREGERSON, CIRCUIT JUDGES

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote of the suggestion for rehearing en banc. Fed.

R. App. R. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.